



BUNDESRECHTSANWALTSKAMMER

Comments
from the Bundesrechtsanwaltskammer
(The German Federal Bar)
CFR-NET Workshop on Pre-Contractual Information

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PROLOGUE

Bundesrechtsanwaltskammer (The German Federal Bar) is the umbrella organisation representing the 27 regional bars and the bar at the Federal Court of Justice. Currently the bars represent a total of approximately 138,300 lawyers in the Federal Republic of Germany.

Bundesrechtsanwaltskammer is generally in favour of preparations for the Study Group on a European Civil Code and Acquis Group for the “Pre-Contractual Information” workshop. The division of regulations among “Acquis Revision” and “Directly relevant” is, however, insufficiently systematic and lacks coherence. The regulations in general create the impression that they were drawn up rather hastily in order due to the new shift of focus of the European Commission. The draft otherwise contains numerous undetermined legal terms, which could in practice lead to lack of legal clarity. Some sections are also over-regulated.

Specifically:

Art. II.-2:201: Negotiations contrary to good faith

The formulation “with no real intention” occurs in paragraph 3 of this regulation. In legal practice it will be scarcely possible to prove that any “real intention” exists. This formulation is therefore scarcely justiciable. In general, the question arises as to whether there is really any need for a separate act of infringement to be defined for “good faith and fair dealing”.

Art. II.-2:202: Breach of confidentiality

For “B2B” transactions, the regulation can by all means find use as a practical addition to existing contract law. For “B2C” transactions, however, the regulation has less practical use, as such cases will generally relate to the protection of personal data and not the protection of industrial or commercial secrets of the customer. The third paragraph in the regulation will therefore have little relevance for the consumer. It would in any case be quite difficult to regulate the peculiarities of a supplier chain, at the end of which is a consumer, with this regula-

tion. The consumer has namely wide-ranging rights to information regarding all aspects of an agreement he is to enter into with a company. Due to the wide-ranging confidentiality obligation contained in this regulation, the contractor who becomes a contractual partner of a consumer could, however, for his part find himself in a difficult situation of not being able to fulfil his contractual duty to inform his partner comprehensively or having to disclose commercial secrets of his suppliers without due authorisation. These conflicting obligations could scarcely be reconciled in practice.

Art. II.-6:201: Mistake

In paragraph 2, sub-section a) of this regulation, the burden of proof in the case of “Inexcusable” would have to be clarified. It is also not clear in the case of “mistake” by both sides (iii) why the risk of “failure to take effect” has to be borne by the other contractual partner.

Art. II.-6:203: Adaptation of contract in case of mistake

The principle of adapting the contract before cancelling it is to be welcomed. This means that the parties should in the case of a mistake by both sides (3) decide independently on whether or not they wish to revive the contract with the amended terms.

Art. II.-2:307: Liability for loss caused by reliance on incorrect information

The most conspicuous feature of this regulation is the distinction between the “other party” and “provider of the information”. The indemnity liability of the “other party” should arise only in cases when it was provided by the “provider of the information” and this party is responsible for the damage. The formulation “Had no reasonable grounds for believing it to be correct” is also scarcely justifiable. Finally, the condition “believed the information to be incorrect” would be extremely difficult to prove.

Art. II.-6:204: Fraud

This regulation should provide clarification that an error will be assumed only when the party suffering the fraud or that was not informed would not have entered into the agreement if it had not made the mistake. In general, a clear definition of the “mistake” would also be helpful.

Art. II.-6.207: Third persons

A specific definition of a term is advisable in this regulation – not least due to the experience with CISG. The condition “reasonable” is insufficiently defined and would ultimately have to be clarified by a high-court decision.

Art. II.-6:212: Partial avoidance

Total nullity would be preferred if a contract were to be contested. A reduction of the provision, while maintaining overall validity, leads to many problems.

Art.II.-2:301: Duty to inform about goods and services

The quality of the information to be provided in accordance with this regulation is need to be clearly defined. It should be considered whether it would not be better to delete the formulation in the second clause “taking into account the standards of quality and performance which would be normal under the circumstances”. The formulation “reasonably expect” is also unclear.

Art. II.-2:302: Specific duties for businesses marketing goods to consumers

Experience with CISG (Art. 2 lit. a)) should be incorporated in this regulation. It is also not recognisable for a businessman whether the other party is to be classified as a consumer or a company.

Art. II.-2:303: Duty to provide information when concluding contract with consumer who is at a particular disadvantage

Experience with distance selling should be incorporated in this regulation.

Art. II.-2:304: Clarity and Form

In this regulation, the differentiation between “in writing” and “textual form” would need to be explained in more detail. The question arises as to whether a different form is being assumed here.

It should also be examined whether the time “at the time of conclusion of the contract” was chosen correctly here. In Article II.-2:305 the time in question is “before the conclusion of a contract”.

II.-2:305: Remedies for breach of information duties

The formulation “all of their other requirements” is undefined. The “other requirements” should be defined clearly. The legal consequences should also be presented.